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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 51

HYMAN WAINER, LOUIS WAINER, GEORGE DAVIS, DONALD BLINK, AND ED. LUECK, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 153–159) is reported in 82 F. (2d) 305.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 20, 1936 (R. 159–160). A petition for rehearing was denied April 17, 1936 (R. 175). The petition for writ of certiorari was filed May 8, 1936, and granted June 1, 1936, lim-

ited to the question whether the statute upon which the second count of the indictment was based was repealed by the National Prohibition Act and not reenacted (R. 177). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Rule XI of the Rules of Practice and Procedure after Plea of Guilty, Verdict, or Finding of Guilt in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

The question presented, as limited by the writ of certiorari, is whether Revised Statutes, Section 3242, *infra,* prescribing a penalty for carrying on the business of a wholesale liquor dealer without having paid the special tax as required by law, and upon which the second count of the indictment is based, was repealed by the National Prohibition Act and not reenacted.

Petitioners also present, for the first time, the additional question whether, if the above statute was reenacted, it has been rendered inoperative by the adoption of the Twenty-first Amendment.

STATUTES INVOLVED

Revised Statutes, Section 3242 (U. S. C., Title 26, Section 1397), provides, in part:

> Any person who shall carry on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt

> liquors, retail dealer in malt liquors, or manufacturer of stills without having paid the special tax as required by law shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned not less than thirty days nor more than two years. * * *

National Prohibition Act, c. 85, 41 Stat. 305, 317–318, Title II, Section 35, so far as here material, declares:

> All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability,

civil or criminal, heretofore or hereafter incurred under existing laws. * * *

Act Supplemental to the National Prohibition Act (Act of Nov. 23, 1921, c. 134, 42 Stat. 222, 223), Section 5, provides, in part:

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor. * * *

STATEMENT

Petitioners were indicted, with a number of others, on May 4, 1934, in the United States District Court for the Eastern District of Wisconsin on four counts of an indictment charging a conspiracy to violate various provisions of the In-

ternal Revenue laws, and to defraud the United States, by setting up stills without being registered as required by law, by engaging in the business of a distiller, rectifier, and wholesale liquor dealer without complying with the law with respect to the filing of bonds, obtaining permits, and paying taxes, and by violating the Internal Revenue laws in many other particulars. They were also charged with the substantive offenses of unlawfully concealing and aiding in the concealment of alcohol on which the tax had not been paid and which had been removed to a place other than the bonded warehouse provided by law, and of removing and transporting 1,650 gallons of alcohol with intent to defraud the Government of the tax thereon.

The second count of the indictment, here involved, charged petitioners with unlawfully carrying on the business of a wholesale liquor dealer without paying the special tax required by law (R. 2–9).

Petitioners were convicted on all counts of the indictment (R. 24) and, after a motion for a new trial was overruled (R. 31), were sentenced as follows: The two Wainers were each given a total term of imprisonment of six years and a total fine of $12,100. The sentence imposed on each on the second count was two years' imprisonment and a fine of $1,000. Petitioners Davis and Blink were each given a general sentence of three months' imprisonment and a fine of $100, and petitioner

Lueck a general sentence of six months' imprisonment and $100 fine (R. 32–33). Upon appeal the convictions were affirmed (R. 159–160) and a petition for rehearing denied (R. 175). On June 1, 1936, this Court granted a writ of certiorari, limited to the question as above stated (R. 177).

SUMMARY OF ARGUMENT

Petitioners' contention that Revised Statutes, Section 3242, *supra,* was repealed by the National Prohibition Act, *supra,* and not reenacted by the Act supplemental to the National Prohibition Act, *supra,* is foreclosed by the decisions of this and other Federal courts.

This Court had held in *United States* v. *Yuginovich*, 256 U. S. 450, that the National Prohibition Act in effect repealed some of the preexisting internal revenue laws, at least so far as the penalties and certain requirements with respect to the operation of distilleries were concerned. Thereafter Congress passed the Act supplemental to the National Prohibition Act, of which the pertinent provisions are printed *supra.* In *United States* v. *Stafoff; Brooks* v. *United States;* and *United States* v. *Remus,* decided together in 260 U. S. 477, this Court held that by Section 5 of the Supplemental Act the former internal revenue laws were reenacted, including Revised Statutes, Section 3242, here involved. This was also the ruling of other Federal courts, with the exception of the case of *Bailey* v. *United States,* 5 F. (2d) 437, relied on by

petitioners, in which the Circuit Court of Appeals for the Fifth Circuit held that the tax imposed on wholesale liquor dealers was repealed by the National Prohibition Act and was not reenacted. This decision was in effect later overruled by the same court in *Anderson* v. *United States,* 30 F. (2d) 485, where it was held, on the authority of this Court's decision in the *Remus* case, *supra,* that it was still an offense to carry on the business of a wholesale liquor dealer without payment of the special tax.

Petitioners' further contention, now made for the first time, that if the statute was reenacted it fell with the repeal of the Eighteenth Amendment was not passed upon by the courts below, nor was the point included in the question as limited by the writ of certiorari. But if, notwithstanding this fact, the Court should decide to consider the question because jurisdictional or otherwise fundamental, we submit that the contention is without merit. This prosecution was not based on any statute ever a part of the prohibition laws, but on the revenue laws. These laws were based on the taxing powers and Congress did not need the support of the Eighteenth Amendment to pass them originally or to reenact them. It was clearly the intention of Congress to retain these laws in force as revenue measures along with the prohibition laws. Under petitioners' argument no internal

revenue laws could have been in force, as such, during the prohibition era or since, despite the fact that after the enactment of the Supplemental Act the Government, with the approval of Congress and the courts, continually used these laws as revenue measures and to enforce the liquor taxes as distinguished from enforcing the prohibition laws. These revenue laws were in force at all times as separate and distinct taxing statutes since their original enactment, except for a short hiatus between the enactment of the National Prohibition Act and the Supplemental Act, and they have remained in force notwithstanding the repeal of the Eighteenth Amendment.

Petitioners were convicted upon a valid indictment based on a statute in full force and effect, and the judgment of the court below should accordingly be affirmed.

ARGUMENT

THE STATUTE UNDER WHICH PETITIONERS WERE INDICTED AND CONVICTED WAS IN FULL FORCE AND EFFECT

Petitioners contend that Revised Statutes, Section 3242, for a violation of which they were convicted under the second count of the indictment, was repealed by the adoption of the Eighteenth Amendment and the passage of the National Prohibition Act, and was not reenacted by the provisions of the Act supplemental to the National Pro-

hibition Act, which was commonly known as the Willis-Campbell Act. They further contend that even if the statute was reenacted by the Supplemental Act, it was reenacted not as a revenue measure, but as a penal provision in aid of the enforcement of national prohibition, and therefore was rendered inoperative by the adoption of the Twenty-first Amendment.

In Section 35, Title II, of the National Prohibition Act, *supra*, Congress had provided that all laws that were inconsistent with the Act were repealed only to the extent of such inconsistency and that the regulations therein provided for the manufacture of and traffic in liquor should be construed as in addition to existing laws. It was further provided that the Act should not relieve anyone from paying any taxes or other charges imposed upon the manufacture of or traffic in liquor; that no liquor revenue stamps or tax receipts for any illegal manufacture or sale of liquor should be issued in advance, but that upon evidence of such illegal manufacture or sale a tax should be assessed against and collected from the person responsible therefor in double the amount then provided by law, with the addition of certain named penalties.

Congress had evidently intended by these provisions to keep the old internal revenue laws in force along with the National Prohibition Act. But a controversy soon arose as to whether or not some of the provisions of the preexisting laws

were so inconsistent with the new Act as to effect their repeal. This controversy resulted in a conflict of decisions in the courts below. The matter finally reached this Court in *United States* v. *Yuginovich et al.*, 256 U. S. 450, where the defendants were charged with violating Revised Statutes, Sections 3257, 3279, 3281, and 3282 (U. S. C., Title 26, Sections 1155 (f), 1182, 1184, and 1185) by attempting to defraud the Government of the tax upon spirits distilled and by failing to meet certain requirements and committing certain offenses in connection with the operation of a distillery. A motion to quash and a demurrer to the indictment were sustained by the trial court on the ground that the sections in question had been repealed. In affirming that decision this Court pointed out that these statutes had long been a part of the Federal internal revenue legislation and were passed under the authority of the taxing power of Congress at a time when the manufacture and sale of liquor were legal; that the Government had derived a large amount of revenue from taxing the liquor business which it sought to realize and protect by a system of laws of which the above sections were a part, but that this policy was changed by the adoption of the Eighteenth Amendment and the passage of attendant legislation prohibiting the manufacture and sale of liquor for beverage purposes. With reference to the taxes retained in Section 35 of the National Pro-

hibition Act the Court said that Congress could under the broad authority of the taxing power tax intoxicating liquors notwithstanding their production was prohibited, and the fact that the statute had a moral end in view as well as that of raising revenue presented no valid constitutional objection to its enactment, but that, while Section 35, considered by itself, was strongly indicative of an intention to retain the old laws, Congress did not intend, in view of the Eighteenth Amendment and the Prohibition Act, to retain the penalty in the old laws when it had provided a lesser penalty in the new Act for attempting to defraud the Government of a tax, and that likewise it did not intend to keep in force the other requirements with respect to distilleries when the production of liquor for beverage purposes was no longer legal.

Congress, however, was not content with this situation. Almost immediately it passed the Act supplemental to the National Prohibition Act, Section 5 of which is printed at p. 4, *supra*.

This statute came before this Court for construction in *United States* v. *Stafoff; Brooks* v. *United States; United States* v. *Remus*, 260 U. S. 477, in which it was held that it was the intention of Congress by the enactment of the Supplemental Act to restore or reenact the internal revenue laws that had theretofore existed, but that Section 5 thereof was not retroactive so as to cover and penalize matters that had transpired prior to the

passage of the supplemental Act. Some of the statutes involved in the *Stafoff* and *Remus* cases were the same as those passed upon in the *Yuginovich* case. That involved in the *Remus* case was Revised Statutes, Section 3242, which is the provision under consideration in the instant case. After referring to Section 5 of the Supplemental Act as having been passed with reference to its decision in the *Yuginovich* case, the Court said (p. 480):

> The decision in *United States* v. *Yuginovich* must stand for the law before November 23, 1921. In that case, besides what we have mentioned, it was held also that the penalty imposed by Rev. Stats. Sec. 3257 on a distiller for defrauding the United States of the tax on the spirits distilled by him was repealed. So far as the liquor is for beverage purposes the same reasoning must apply to the penalty in Sec. 3242 for carrying on the business of rectifier or wholesale or retail liquor dealer without having paid the special tax imposed by law.
>
> But the Supplemental Act that we have quoted puts a new face upon later dealings. From the time that it went into effect it had the same operation as if instead of saying that the laws referred to shall continue in force it had enacted them in terms. The form of words is not material when Congress manifests its will that certain rules shall govern henceforth. *Swigart* v. *Baker*,

> 229 U. S. 187, 198. Of course Congress may tax what it also forbids. 256 U. S. 462. For offenses committed after the new law, *United States* v. *Yuginovich* can not be relied upon. Three counts in the *Remus* case charge carrying on the business mentioned up to April 1, 1922, and therefore are governed in part by the Supplemental Act. So far as the decision of the Court below neglected this distinction it was wrong. * * *

There can be no doubt, therefore, that the statute under which petitioners were convicted upon count two of the indictment was reenacted by the Supplemental Act.

Petitioners rely on *Bailey* v. *United States,* 5 F. (2d) 437 (C. C. A. 5th), in which it was held that the tax imposed upon wholesale liquor dealers by Revised Statutes, Section 3244 (U. S. C., Title 26, Section 1394 (a)), which tax the petitioners in the instant case were charged with having failed to pay, was repealed by the National Prohibition Act and was not reenacted. Although decided after the enactment of the Supplemental Act and the decision of this Court in the *Yuginovich* case, no reference is made to either in the opinion. In their support of the decision in the *Bailey* case petitioners point to the statute under which they were convicted of having failed to pay the special wholesale liquor dealers tax and to U. S. C., Title 26, Section 1402, requiring that special taxes shall be

paid in advance on the first day of July in each year, or on commencing any trade or business, and they urge that these provisions were in such irreconcilable conflict with the National Prohibition Act and the Supplemental Act that there could have been no reenactment, because the latter Acts prohibited the manufacture and sale of liquor and made compliance with the former laws with respect to the payment of taxes impossible by prohibiting the acceptance of special taxes and the issuance of receipts therefor in advance. The same argument was presented to this Court in *United States* v. *One Ford Coupe,* 272 U. S. 321, where the $2.20 per gallon production tax on distilled spirits was involved. This Court said (p. 327):

> These supervening obstacles to paying the tax do not, however, establish that the intention was not to continue it in force. A law which imposes a tax on intoxicating liquor, whether legally or illegally made, is not in conflict with another law which prohibits the making of any such liquor. Compare *United States* v. *Stafoff,* 260 U. S. 477; *Vigliotti* v. *Pennsylvania,* 258 U. S. 403. There is no direct conflict between any provision of the prohibitory legislation and the imposition of the tax here in question.

See also *United States* v. *Yuginovich, supra,* p. 462; *United States* v. *Stafoff, supra,* p. 480, holding that Congress may tax what it also forbids.

The *Bailey* case is the only one coming to our attention where it has been held that any of the pre-

existing revenue laws had not been reenacted. Moreover, the same Circuit Court of Appeals, in *Anderson* v. *United States,* 30 F. (2d) 485, later held, on the authority of the *Remus* case, that it was still an offense to carry on the business of retail liquor dealer without payment of the special tax. The court said (p. 486):

> The offense is alleged to have been committed since the adoption of the Act of November 23, 1921 (42 Stat. 222), popularly referred to as the Willis-Campbell Act. It is settled that it is still an offense to carry on the business of retail liquor dealer without having paid the license tax for so doing, although no tax may be in fact paid, nor may permission be granted to conduct the business. *U. S.* v. *Remus et al.,* 260 U. S. 477, * * *.

To the same effect is *Forcman* v. *United States,* 28 F. (2d) 768, 769 (C. C. A. 8th).

This same view is taken by the courts below of other sections of the revenue laws. In the following cases it was held that Revised Statutes, Section 3296 (U. S. C., Title 26, Section 1287), providing a penalty for the removal and concealment of tax-unpaid distilled spirits, was reenacted by the Supplemental Act: *Harrison* v. *United States,* 25 F. (2d) 1019 (C. C. A. 4th); *Benton* v. *United States,* 28 F. (2d) 695, 696 (C. C. A. 4th); *Whitehead* v. *United States,* 73 F. (2d) 896 (C. C. A. 5th), reversed on other grounds.

In *Neely* v. *United States,* 2 F. (2d) 849, 852 (C. C. A. 4th), and *Rossi* v. *United States,* 60 F. (2d) 955 (C. C. A. 7th), affirmed in 289 U. S. 89, it was held that Revised Statutes, Section 3281 (U. S. C., Title 26, Section 1184) and other provisions of the revenue laws regulating the operation of stills so as to insure collection of the tax, were restored by the Supplemental Act. In the latter case the Circuit Court of Appeals said (p. 955):

> We think that the effect of the Willis-Campbell Act was to re-enact the provisions of the internal revenue laws relied upon by the government in this case. Difficulties or even impossibilities in complying with the provisions of the revenue laws thus re-enacted, do not establish that the intention of Congress was not to continue those provisions in force. There is no direct conflict between the prohibitory legislation and the provisions of the revenue laws here involved.

It will thus be seen that the overwhelming weight of authority is against petitioners' contention that Revised Statutes, Section 3242, was not reenacted by the Act supplemental to the National Prohibition Act.

Petitioners now further contend, however, that even if the statute in question and other preexisting revenue laws were reenacted, they were reenacted not as revenue measures, but as penal pro-

visions in aid of the enforcement of national prohibition, and therefore had been rendered inoperative by the adoption of the Twenty-first Amendment repealing the Eighteenth Amendment and the laws enacted thereunder.

This point was not included in the petition for rehearing in the court below, where the question that the statute had been repealed and not reenacted was raised for the first time (R. 171), nor was it referred to in the petition for certiorari or supporting brief. These documents stressed the scope and effect of the Supplemental Act and the conflict of decisions thereon. Consequently, the point was not included in the question as limited by the writ of certiorari. Not only was the point not raised in the application for certiorari nor included in the question as limited by this Court, but the courts below should have been given an opportunity to pass upon the point. See *United States* v. *LaFranca,* 282 U. S. 568, 576; *Various Items* v. *United States,* 282 U. S. 577, 582; *Webster Elec. Co.* v. *Splitdorf Co.,* 264 U. S. 463.

But even if the question be regarded as jurisdictional or otherwise fundamental and should therefore be considered (*Gila Valley Ry. Co.* v. *Hall,* 232 U. S. 94, 98–99; *McCarthy* v. *Arndstein,* 262 U. S. 355, 360), we nevertheless submit that petitioners' contention cannot prevail.

The basis of their contention is that the National Prohibition Act outlawed all traffic in intoxicating

liquor for beverage purposes; that the Supplemental Act was passed to aid enforcement of prohibition and not to raise revenue, and that, while Section 5 of the latter Act might be considered a reenacting clause, it did not make a tax out of what was held to be a penalty in *Lipke* v. *Lederer,* 259 U. S. 557, and *Regal Drug Co.* v. *Wardell,* 260 U. S. 386. The argument is that Section 5 was so commingled with and a part of the supplemental Act, whose sole purpose was to extend, clarify, and strengthen the National Prohibition Act, that any laws restored by it were restored with a view to aiding prohibition, as distinguished from raising revenue, and that these laws, like others passed pursuant to the Eighteenth Amendment, necessarily fell with the repeal of that Amendment.

Notwithstanding the fact that Section 5 appeared in the Supplemental Act, it may be said that that part which reenacted the preexisting revenue laws was complete within itself. It was a general provision entitled to stand upon its own foundation. Congress did not need the support of the Eighteenth Amendment to restore the revenue laws. The original revenue laws were not based on the Eighteenth Amendment and prohibition legislation, but on the revenue powers of Congress, and this power continued to exist after prohibition, either to enact new laws or to restore old ones.

But whatever may have been the basis of Section 5, it clearly expressed the intention of Congress to

retain the revenue laws in force side by side and along with the Prohibition Act. That less revenue was derived through them during the prohibition era and that they were sometimes used as aids to prohibition is immaterial. They were restored in their full vigor as revenue measures and as independent taxing statutes and were available and frequently used as such during the prohibition period with the approval of Congress and the courts. It was probably through an inadvertence in the passage of the National Prohibition Act that the revenue laws were repealed. Despite the fact that Congress had stated in general terms in that Act that it was its intention to retain the taxing statutes, it was found by this Court in the *Yuginovich* case, *supra,* that certain provisions of the revenue laws had been repealed. Congress hastily moved to restore them. They have so remained ever since through many Congresses and have been construed and upheld by the courts.

It is now too late, in view of the Congressional enactments and the decisions of the courts, for petitioners to argue that there was no revenue tax, as such, on liquor during the prohibition era when its manufacture and traffic were prohibited. Not only did Section 35, Title II, of the National Prohibition Act, provide that, "This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic

in such liquor", but Section 5 of the Supplemental Act explicity re-enacted all laws in regard to the taxation of intoxicating liquor not in direct conflict with the Prohibition Act. In the *Ford Coupe* case, *supra,* it was said (pp. 326–327):

> The continued existence of taxes upon illicit liquor is indicated in Sec. 35 of the National Prohibition Act (p. 317), which provides: "This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor." That Congress in enacting that law would intentionally have exempted illicit liquor from taxation is not likely. Moreover, we are not dealing with the construction of the law as enacted in 1919. The Willis-Campbell Act, November 23, 1921, c. 134, Sec. 5, 42 Stat. 222, 223, supplemental thereto, continued in force or reenacted, by express provision, all laws in regard to the taxation of intoxicating liquor not directly in conflict with the prohibitory legislation. Furthermore, the Revenue Act of 1921, November 23, 1921, c. 136, Sec. 600, 42 Stat. 227, 285, enacted on the same day, shows that Congress had no intention then of relieving liquor from taxation merely because illegally dealt with. For it provided specifically that if distilled spirits, tax-paid for non-beverage purposes, be diverted to beverage purposes, an additional tax of $4.20 per gallon must be paid, although under the law such diversion could not be made legally.

Again, in answer to contentions similar to those made by petitioners here, the Court said (p. 328):

> The claimant contends that the so-called tax on illicitly distilled spirits theretofore imposed ceased to be a tax and became in law a penalty, when the enactment of the National Prohibition Act changed the purpose of the tax from raising revenue to preventing manufacture, sale, and transportation; and that to enforce such penalty by forfeiture of the property rights of innocent third parties would be a denial of due process of law. It is true that the use of the word "tax" in imposing a financial burden does not prove conclusively that the burden imposed is a tax; and that when it appears from its very nature that the imposition prescribed is a penalty solely, it must be treated in law as such. But the imposition here in question is not of that character. A tax on intoxicating liquor does not cease to be such because the sovereign has declared that none shall be manufactured, and because the main purpose in retaining the tax is to make law-breaking less profitable. What was sought to be enforced and held to be a penalty in *Lipke* v. *Lederer,* 259 U. S. 557, 561, was the so-called double tax. Here, we are dealing with the basic production tax.
>
> With respect to the character of the impositions called taxes there is nothing in either the Revenue Acts or the Prohibition Act which makes any distinction between

> the product of legal and illegal distillation. The Acts left in effect the basic tax of $2.20 per gallon, which was and is a true tax on the product, whether legally or illegally distilled, and added to it the additional amounts in case of illegal distillation or diversion to illegal uses. These additional amounts also are called taxes by Congress, and were understood by it to be such. Whether they were intrinsically penalties and should be treated as such we need not determine. The basic tax of $2.20 a gallon on liquor illegally produced is not imposed because of illegality, but despite of it.

In the later case of *United States* v. *LaFranca,* 282 U. S. 568, 573, which dealt with specific penalties and taxes converted into penalties by double imposition under Section 35 of the National Prohibition Act, the Court distinguished the *Ford Coupe* case by stating that its purpose "was to enforce a simple tax, not one which had been, as here, converted, by a change of its nature, into a penalty." *Various Items* v. *United States,* 282 U. S. 577, involved the forfeiture under the revenue laws of premises on which a distillery business had been conducted with intent to defraud the Government of the tax on the spirits distilled. The fraud consisted in the diversion of alcohol for beverage purposes without payment of the $6.40 per gallon diversion tax. The Court said (p. 579): "Included in the $6.40 is the basic tax of $2.20, which is not a

penalty but a true tax. Only the remaining part of the $6.40 may be regarded as a penalty." See also *United States* v. *Rizzo,* 297 U. S. 530, 533.

There is no difference in principle between the taxes involved in the above cases and a wholesale liquor dealer's tax. If the basic production tax remained in effect after the Prohibition Act was enacted and could be enforced in its original character as a tax, notwithstanding the double imposition features of Section 35, it necessarily follows that the tax here involved also remained in force as a tax, and not as a penalty as petitioners contend. The fact is that these internal revenue liquor taxes, and the laws enacted to insure their collection, were in force at all times during the prohibition era and were not affected by the repeal of the Eighteenth Amendment and the prohibitory liquor laws.

If petitioners' contention be sound then it must follow that there are no internal revenue liquor laws now in force, notwithstanding the fact that during the prohibited period, after the enactment of the Supplemental Act, the Government continually used these laws as revenue measures and to enforce the liquor taxes, as distinguished from enforcing the prohibition laws, the same as before the advent of prohibition. The Government regarded these two sets of laws—the revenue Acts and the prohibitory liquor laws—as concurrently in force and used them at its option or election,

proceeding first under one and then the other, both as to prosecution and as to matters of forfeiture. This action had the approval of Congress and the courts and petitioners should not now be heard to say that it was improper. Among such internal revenue cases receiving the approval of this Court were the *Ford Coupé* case, *supra,* involving the forfeiture under Revised Statutes Section 3450 (U. S. C., Title 26, Section 1441), of an automobile used in the deposit and concealment of distilled spirits with intent to defraud the Government of the tax thereon; *Various Items* v. *United States, supra,* a proceeding under Revised Statutes, Sections 3257 and 3281 (U. S. C., Title 26, Sections 1155 (f) and 1184), to forfeit a distillery and other premises used in a distilling business in fraud of the tax, and *Rossi* v. *United States,* 289 U. S. 89, a prosecution for failure to comply with various internal revenue laws relating to the possession and operation of stills.

Petitioners point to no decision holding that the internal revenue laws fell with the repeal of the Eighteenth Amendment and prohibition legislation, and we know of none. On the other hand, those courts which have passed upon the subject have declared the former laws in full force and effect. In *Benton* v. *United States,* 70 F. (2d) 24, the Circuit Court of Appeals for the Fourth Circuit held that a prosecution under Revised Stat-

utes, Sections 3296 and 3450 (U. S. C., Title 26, Secs. 1287, 1441), for the removal and concealment of tax-unpaid distilled spirits and other commodities with intent to defraud the Government of the tax thereon, was not affected by the repeal of the Eighteenth Amendment. In *United States* v. *Anderson,* 8 F. Supp. 88 (S. D. N. Y.), it was held that the repeal of the Eighteenth Amendment did not render inoperative Revised Statutes, Section 3258 (U. S. C., Title 26, Sec. 1162), requiring the registering of stills. In *United States* v. *Wilson,* 9 F. Supp. 968 (W. D. N. Y.), the court said (p. 969): "Those statutes which did not rest upon the grant of authority to Congress by virtue of the Eighteenth Amendment were not affected by the adoption of the Twenty-First Amendment." In *United States* v. *Bacon,* 7 F. Supp. 590 (W. D. Tex.), it was held that the internal revenue laws punishing the possession of an unregistered still, carrying on the business of a distiller without giving bond or with intent to defraud the United States of the tax, and making mash at a place other than an authorized distillery, rest upon the power of Congress to levy an excise and not on the Eighteenth Amendment, and that it was not intended that these laws, or that part of the Supplemental Act which reenacted them, should fall with the Prohibition Act which was in effect repealed by the Twenty-First Amend-

ment. See also *United States* v. *Columbia Fruit Products Co.*, 10 F. Supp. 873 (E. D. Pa.).

If these cases were correctly decided petitioners' convictions must stand, for there is no distinction in principle between the statutes there involved and one intended to enforce collection of the tax imposed on wholesale liquor dealers. They are all aimed at the collection of taxes and prevention of frauds on the revenue.

The Congressional intent, judicial decisions, and rules of statutory construction all weigh against petitioners' contention. This prosecution was not based on any statute ever a part of the prohibition laws; but on the internal revenue laws. These revenue laws were in force at all times as separate and distinct taxing statutes since their original enactment, except for a short hiatus between the enactment of the National Prohibition Act and the Supplemental Act (*United States* v. *Stafoff, supra,* p. 480) and they have remained in force notwithstanding the repeal of the Eighteenth Amendment.

So far as petitioners Davis, Blink, and Lueck are concerned, it would seem that they are in no position to complain even if the convictions on the second count were erroneous. The sentence imposed on each was a general one and did not exceed that imposable under the first count of the indictment upon which they were convicted. *Abrams* v. *United States,* 250 U. S. 616, 619; *Brooks* v. *United States,* 267 U. S. 432, 441.

CONCLUSION

Petitioners were convicted upon a valid indictment based on a statute in full force and effect. We, therefore, respectfully submit that the judgment of the court below should accordingly be affirmed.

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